

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 84441)	ORDER DENYING PETITIONS
IN THE NAME OF)	FOR RECONSIDERATION
<u>BRUCE AND GLENDA MCCONNELL)</u>	

On October 5, 2020, Bruce and Glenda McConnell (“McConnell”) filed Application for Transfer 84441 (“Application 84441”) with the Idaho Department of Water Resources (“Department”). Application 84441 was protested by James Whittaker and Whittaker Two Dot Ranch LLC (collectively “Whittaker”), David R. Tomchak, Smith 2P Ranch, Steven Johnson (“Johnson”), and Rosalie Ericsson. The Department conducted an administrative hearing on April 21 and 22, 2021 in Salmon, Idaho.

On May 18, 2021, the hearing officer for the Department issued a *Preliminary Order Approving Transfer* (“Preliminary Order”). On June 1, 2021, Whittaker filed a timely *Petition for Reconsideration* (“Whittaker Petition”). Also on June 1, 2021, Johnson filed a timely *Petition for Reconsideration* (“Johnson Petition”). Johnson did not send a copy of the *Johnson Petition* to all of the parties. The hearing officer emailed a copy of the *Johnson Petition* to all of the parties on June 3, 2021.

Whittaker Petition

The *Preliminary Order* included the following findings of fact:

13. In the past, the confluence of Stroud Creek and Right Fork of Lee Creek was located near the southwest corner of the SENE of Section 30, T16N, R25E, approximately one-quarter mile upstream of the Upper Diversion.

16. Whittaker diverts water from Stroud Creek at two locations. One location is the Whittaker Diversion, the authorized point of diversion for water rights 74-369, 74-1136, 74-15788. The other location is the point where Stroud Creek is intercepted by a ditch known as the West Springs Ditch.

17. Water rights 74-369, 74-1136 and 74-15788 are limited to a total combined diversion rate of 4.40 cfs from Stroud Creek at the Whittaker Diversion. If the flow in Stroud Creek exceeds 4.40 cfs (or 2.40 cfs when water rights junior to May 12, 1883 are curtailed), the excess flow in Stroud Creek bypasses the Whittaker Diversion. The water rights held by Whittaker do not authorize any diversion from Stroud Creek downstream of the Whittaker Diversion.

18. The West Springs Ditch is a deep, excavated ditch, running from west to east across the Stroud Creek channel. The West Springs Ditch was constructed to capture the flow from a number of springs in the area. There is a man-made berm running along the north side of the ditch which prevents any flow in Stroud Creek from continuing to the north (downstream) past the ditch.

19. The West Springs Ditch captures all of the water flowing in Stroud Creek at that location. Currently, there is “no . . . flume, siphon or culvert that would allow [Stroud Creek] to pass under or over the [West Springs Ditch].” The intersection of the West Springs Ditch and Stroud Creek is located approximately 2000 feet downstream of the Whittaker Diversion.

21. All of the water captured and diverted by the West Springs Ditch, including Stroud Creek water, is conveyed to the east, where it joins another irrigation ditch maintained by Whittaker. This combined ditch is used to convey water over a divide ridge which separates the Stroud Creek drainage from the Big Eightmile Creek drainage.

22. At the divide ridge between the drainages, Whittaker maintains a control structure, known as the hilltop splitter, which can send water into a ditch heading northeast for irrigation use by Whittaker or into a ditch running north toward Lee Creek. Water released by Whittaker at the hilltop splitter is conveyed in a man-made channel for approximately 500 feet and is then injected into an old ditch, known as the Bohan or Bohannan Ditch (hereinafter “Bohan Ditch”).

23. The Bohan Ditch runs east of the Stroud Creek channel. The Bohan Ditch generally runs to the north-northeast, whereas the Stroud Creek channel generally runs to the north-northwest.

24. Stroud Creek no longer flows in its natural channel between the West Springs Ditch and the confluence with Lee Creek. This section of the Stroud Creek drainage has been dewatered as a result of Whittaker’s unauthorized diversion of Stroud Creek into the West Springs Ditch.

25. The Stroud Creek channel has been altered or bypassed between the Whittaker Diversion and the confluence with Lee Creek, a distance of approximately one mile.

26. The current flow path of Stroud Creek water through the Whittaker Two Dot Ranch property does not constitute the natural channel of Stroud Creek.

Preliminary Order at 3-5 (citations omitted).

These findings of fact included extensive citations to the documents and testimony contained in the record, with many citations to the evidence offered by Whittaker. Whittaker challenges these findings and asserts that the current path of water through the Whittaker Two

Dot Ranch property is the natural channel of Stroud Creek. Further, Whittaker asserts that the confluence of Stroud Creek and Right Fork of Lee Creek is now located downstream of McConnell's Upper Diversion.

Stream Channel Alteration Rules

Whittaker argues that the Department's Stream Channel Alteration Rules ("SCA Rules") (IDAPA 37.03.07) require the hearing officer to recognize the current path of water through the Whittaker ditch system as the existing natural channel of Stroud Creek. *Whittaker Petition* at 5-6. Whittaker cites Rule 10.12, which defines the term "stream channel" as:

A natural water course of perceptible extent with definite beds and banks which confines and conducts continuously flowing water. The channel referred to is that which exists at the present time, regardless of where the channel may have been located at any time in the past. For the purposes of these rules only, the beds of lakes and reservoir pool areas are not considered to be stream channels.

IDAPA 37.03.07.010.12.

Under the SCA Rules, the Department's review of stream channel alterations is limited to the current location of a stream channel, regardless of where the channel may have existed in the past. The Stream Channel Protection Act (Chapter 38, Title 42, Idaho Code) forms the statutory basis for the Department's SCA Rules and provides a different definition for the term "stream channel":

"Stream channel" means a natural watercourse of perceptible extent, with definite bed and banks, which confines and conducts continuously flowing water. Ditches, canals, laterals and drains that are constructed and used for irrigation or drainage purposes are not stream channels.

Idaho Code § 42-3802(d) (emphasis added).¹

The West Springs Ditch was originally constructed to convey water for irrigation. *Whittaker Petition* at 21-22. It continues to be used to divert and convey water for irrigation use. *Id.* Neither the West Springs Ditch, the Floyd J Whittaker Ditch, nor any of the other ditches diverting water from Stroud Creek or its tributaries for irrigation use qualify as stream channels under the Stream Channel Protection Act. In addition to Idaho Code § 42-3802(d), the SCA Rules (IDAPA 37.03.07) support the hearing officer's determination that the Whittaker ditch system is not the Stroud Creek channel. As noted in the definitions above, a stream channel confines and conducts "continuously flowing water." The SCA Rules (IDAPA 37.03.07) define the term "continuously flowing water" as follows:

¹ The current definition for "stream channel" set forth in Rule 10.12 of the SCA Rules is the same definition found in the 1993 version of the rules. The second sentence (underlined portion) of Section 42-3802(d) was added to the statutory definition of "stream channel" in 2004.

A sufficient flow of water that could provide for migration and movement of fish, and excludes those reaches of streams which, in their natural state, normally go dry at the location of the proposed alteration. IDWR will assume, subject to information to the contrary, that the USGS quadrangle maps accurately depict whether a stream reach is continuously flowing, at the location of the proposed alteration. Such exclusion does not apply to minor flood channels that are a part of a stream which is continuously flowing in the reach where the alteration is located. Also, such exclusion does not apply to streams which may be dry as a result of upstream diversion or storage of water.

IDAPA 37.03.07.010.04

If not for the West Springs Ditch, which cuts across the Stroud Creek channel, and diversion by upstream water rights, the Stroud Creek channel downstream of the West Springs Ditch would have continuously flowing water. In other words, the Stroud Creek channel below the West Springs Ditch is dry as a result of upstream diversions and the diversion of Stroud Creek into the West Springs Ditch.

Whittaker contends that the hearing officer's reliance on a 1989 USGS quadrangle map to determine the location of the Stroud Creek natural channel is "unprecedented," will have "far-reaching implications" and will "create uncertainty in transfer proceedings." *Whittaker Petition* at 6, 19. The *Preliminary Order* is consistent with the Stream Channel Protection Act and the SCA Rules. It recognizes the channel depicted on the USGS Map below the West Springs Ditch as the current Stroud Creek channel, in spite of the dewatering of the channel by the West Springs Ditch. In contrast, Whittaker proposes classifying the West Springs Ditch and the Floyd J Whittaker Ditch as the current Stroud Creek stream channel, which is in direct conflict with Idaho Code § 42-3802(d).

Whittaker Ditches

For purposes of this contested case, Whittaker seeks to characterize various ditches on the Whittaker Two Dot Ranch property as man-made stream channels rather than ditches. Whittaker's arguments on this point are not persuasive and are inconsistent with the expert reports prepared by Bryce Contor and offered into the evidentiary record by Whittaker.

Contor identifies the intersection of Stroud Creek and the West Springs Ditch as a point of diversion. Ex. 151 at 6-7 ("From 1932 through July 2020 and presumably through the present there has not been a physical channel or means for flow in Stroud Creek (Left Fork) to proceed downstream beyond the West Springs Ditch except to be diverted and conveyed in a private ditch") (emphasis added). "The private ditches that convey water under [water right 74-157] currently also are being used to convey [Stroud Creek] water past the collector ditches, bypassing locations where the historical channels of [Stroud Creek] probably existed." Ex. 153 at 1. Contor observed that Whittaker's "private ditch was unable to contain the increased flows resulting from the imposition of also conveying McConnell's rights." Ex. 151 at 9; Ex. 153 at 10. Further, "[w]hen McConnell's flows are discharged from Whittaker's ditch, they first enter the remnants of an older ditch identified . . . as the 'Bohan' ditch . . ." *Id.* at 9-10. "That ditch

too is inadequate to contain the flows and it and the surrounding rangeland area also are being eroded and damaged by the new flow regime.” *Id.* at 10. Contor concluded that “[Application 84441] would indirectly injure Whittaker[] by requiring them to divert McConnell’s rights through an unauthorized [point of diversion], convey them in their own private ditch and inject them into Stroud Creek” *Id.*

The following passages are taken from one of the expert reports prepared by Contor and are based on his field observations from July 2020. They describe the current path of water from just above the West Springs Ditch to the point where water is injected into the Bohan Ditch:

. . . From walking the bank of the [West Springs Ditch], I visually estimate that the ditch is four to five feet wide and incised three to four feet deep. The gradient is very flat and flow velocity is low. The engineer’s map seems to indicate the channel of Lee Creek crossing the collection ditch from the West Springs near letter K, but I saw no indication of any kind of flume, siphon or culvert that would allow the creek to pass under or over the ditch.

From the West Springs collector ditch, the ditch proceeds to a hilltop distribution point with a three-foot Cipoletti weir and control gate that could convey water to the north-northwest, and a six-foot Cipoletti weir that delivers water down the hill into a ditch that proceeds to the north-northwest. The control gate was closed on July 3 and all water was passing over the six-foot weir and down the hill.

At the bottom of the hill, flow enters a ditch that connects with another collector ditch, known locally as the “Bohan Ditch,” near Waypoint 36. I walked upstream along the Bohan Ditch until I encountered its intersection with and capture of the original channel. There is no control structure or bypass capacity, no indication of earth work or disturbance for many years, and no indication of flow down the original channel beyond the Bohan Ditch for many years. It appears that historically the Bohan Ditch would have captured any flow from upstream, including any Lee Creek flow that had not been captured by the West Springs collector ditch.

Ex. 153 at 4.

Whittaker argues: “The characterization of the channel that currently conveys Stroud Creek water as the ‘Whittaker ditch system’ is legally and factually inaccurate” *Whittaker Petition* at 5. This argument is not persuasive. The characterization of the channel as the “Whittaker ditch system” is factually accurate and is consistent with the expert reports prepared for and offered by Whittaker.

Poole v. Olaveson

Whittaker argues: “The water course running through the Whittaker Two Dot Ranch property is now the natural channel of Stroud Creek, even if it was artificially created, because it replaced the channel that previously existed” *Whittaker Petition* at 9. According to

Whittaker, “[t]he current path of Stroud Creek . . . may not be in the *original* natural stream channel, but such path is now the legal natural channel of Stroud Creek.” *Id.* at 14 (*italics in original*). To support their argument, Whittaker cites an Idaho Supreme Court decision, *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

The facts from *Poole* differ from the facts presented in this contested case. In *Poole*, the Spring Creek channel near Menan, Idaho had been straightened in a number of sections to eliminate meanders in the creek channel and to facilitate the drainage of farm ground bordering the creek channel. *Poole*, 82 Idaho at 500, 356 P.2d at 63. The revised channels were not constructed to capture Spring Creek water for irrigation use or any other use. *Id.* Rather, the channels were constructed to more efficiently pass Spring Creek water through the properties. *Id.* Respondent Olaveson sought to discharge waste water into one of the straightened sections of Spring Creek. *Id.*, 82 Idaho at 501, 356 P.2d at 64. The Idaho Supreme Court recognized the straightened sections of Spring Creek as the existing natural channel of the creek and confirmed Olaveson’s right to discharge waste water into the straightened sections of the creek. *Id.*, 82 Idaho at 504-505, 356 P.2d at 65-66.

In this case, the Stroud Creek channel wasn’t altered to remove meanders or facilitate drainage. According to the evidence presented by Whittaker, the West Springs Ditch was constructed to capture spring water arising on the west side of Stroud Creek for irrigation use. Originally, the water from the West Springs complex was flumed across the Stroud Creek channel. After the flume failed, the West Springs Ditch was reconstructed to capture Stroud Creek water for irrigation use. Whittaker continues to divert spring water and Stroud Creek water through the West Springs Ditch for irrigation use.

Whittaker contends that the continuous diversion of a creek through an irrigation ditch can convert the irrigation ditch into the natural channel for purposes of water right administration. Whittaker has not identified any statute or case law that would support such a proposition. As noted above, for purposes of the Stream Channel Protection Act, a ditch that was constructed and is used for irrigation is not a stream channel. The definition of “stream channel” set forth in Idaho Code § 42-3802(d), however, may be limited to the application and enforcement of Chapter 38, Title 42, Idaho Code. *See Smith v. King Creek Grazing Assn.*, 105 Idaho 644, 648, 671 P.2d 1107, 1111 (1983) (noting that the definition of “stream channel” used in Idaho Code § 42-3802 is more restrictive than other definitions). It does not necessarily extend to other areas of water law. The Idaho Supreme Court has adopted a definition of the term “watercourse” to address other water-related disputes. For example, in a case addressing the riparian rights of landowners along a natural slough channel that was used to convey water for irrigation, the Idaho Supreme Court defined the term “watercourse” as follows:

[A] watercourse is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.

Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 488, 101 P. 1059, 1061 (1909). This same definition was used by the court in a decision about drainage servitudes. *Smith v. King Creek Grazing Assn.*, 105 Idaho 644, 647, 671 P.2d 1107, 1110 (1983).

Although the definition of “watercourse” adopted by the Idaho Supreme Court is broad enough to include water flowing in ditches, there are significant differences between ditches and natural channels under Idaho law. For example, Idaho Code § 42-101 states that the waters of the state, when flowing in their natural channels, are subject to appropriation. In contrast, water flowing in a ditch, when lawfully diverted, is the property of the appropriator and is not subject to appropriation. Idaho Code § 42-110. The Idaho Supreme Court rejected a proposal to appropriate water by diverting water from another’s ditch. *Frost v. Penfold*, 44 Idaho 651, 656 258 P. 534, 535 (1927). Idaho Code § 42-602 distinguishes between natural water sources and the ditches diverting therefrom. Chapter 12, Title 42, Idaho Code sets forth the standards for maintaining ditches. These maintenance requirements do not apply to natural channels.

Whittaker seeks to blur the line between ditches and natural channels, arguing that a ditch may be converted into a natural channel over time if a diversion is constructed in a way that captures the entire flow of a creek. Given the significant differences between natural channels and ditches under Title 42, Idaho Code, the hearing officer is not persuaded that a ditch, which is actively used to convey and deliver water for irrigation, can be characterized as a natural channel. The current path of water through the Whittaker ditch system is not the natural channel of Stroud Creek.

Evaluation of Transfers Based on Past Conditions

Whittaker argues that the *Preliminary Order* is speculative because it evaluates Application 84441 under stream channel conditions that no longer exist. *Whittaker Petition* at 7-8. Whittaker takes issue with the use of the phrases “was once located” and “in the past” to describe the location of the confluence of Stroud Creek and Right Fork of Lee Creek. *Id.* at 3, 5. Whittaker contends that the “injury analysis must consider the present conditions on Stroud Creek.” *Id.* at 8.

The phrases “was once located” and “in the past” are an accurate description of the evidence in the record related to the confluence of Stroud Creek and Right Fork of Lee Creek. The *Preliminary Order* identifies substantial and compelling evidence that the confluence was previously located upstream of McConnell’s Upper Diversion. The question presented to the hearing officer is whether the confluence continues to exist at the same location today. The hearing officer concluded that the confluence of Stroud Creek and Right Fork of Lee Creek continues to be located upstream of McConnell’s Upper Diversion. The hearing officer reached this conclusion by evaluating the current conditions in the Stroud Creek drainage. Currently, Whittaker diverts all of the flow in Stroud Creek at the West Springs Ditch without a water right. Currently, because of Whittaker’s unauthorized diversion, no Stroud Creek water flows past the West Springs Ditch. Currently, Whittaker injects unused Stroud Creek water into the remnants of the Bohan Ditch, an old ditch running to the east of the Stroud Creek channel. The 1989 USGS Map and 1954 Map show the Stroud Creek channel extending from the West Springs Ditch area north to a confluence located upstream of McConnell’s Upper Diversion. It is not

speculative or arbitrary to rely on these two historical maps, which both depict the confluence of Stroud Creek and Right Fork of Lee Creek in the southwest corner of the SENE of Section 30, T16N, R25E.

Whittaker argues: “The fact is undisputed that the current physical confluence of Stroud Creek with the Right Fork of Lee Creek is below [McConnell’s] Upper Diversion.” *Whittaker Petition* at 4. This is not an accurate summary of the evidence in the record. The *Preliminary Order* correctly summarizes the evidence in the record relied on by the hearing officer. Stroud Creek water, diverted by Whittaker at the West Springs Ditch without a water right, is released into Lee Creek at a location downstream of McConnell’s Upper Diversion.

Unauthorized Diversion at West Springs Ditch

The *Preliminary Order* does not determine whether Whittaker’s historical (pre-SRBA) diversion of Stroud Creek water at the West Springs Ditch was authorized. Nor does it state that Whittaker’s actions resulting from the *Whittaker v. Kauer* case were unauthorized. The *Preliminary Order* acknowledges that, prior to 2014, Whittaker diverted and used the entire flow of Stroud Creek, but did not determine whether that diversion was within the limits of the relevant water rights. Whittaker’s construction and use of the West Springs Ditch to divert Stroud Creek water may have been consistent with the elements of the relevant water rights in the past. Currently, however, Whittaker’s Stroud Creek water rights do not identify the West Springs Ditch, or any other ditch downstream of the Whittaker Diversion, as an authorized point of diversion. Evidence in the record confirms that Stroud Creek water flows past the Whittaker Diversion. The West Springs Ditch captures any Stroud Creek water bypassing the Whittaker Diversion. The *Preliminary Order* properly characterizes Whittaker’s diversion of Stroud Creek at the West Springs Ditch as an “unauthorized” diversion of Stroud Creek water. The *Preliminary Order* does not determine whether Whittaker’s diversion of water from the West Springs complex or East Springs complex are consistent with the elements of water right 74-157.

Unauthorized Stream Channel Alteration

Whittaker provided evidence and testimony that the Stroud Creek channel has been altered between the Whittaker Diversion and the West Springs Ditch. The *Preliminary Order* does not determine whether the stream channel alterations occurring on the Whittaker property were authorized at the time they occurred.

Intersection of Stroud Creek and West Springs Ditch

Whittaker contends that Stroud Creek is not actually captured by the West Springs Ditch, but instead flows into another man-made channel running from south to north. *Whittaker Petition* at 15. The man-made channel then intersects with the West Springs Ditch. *Id.* This error, if one exists, is inconsequential. Regardless of whether Stroud Creek water is first captured by the West Springs Ditch or some other man-made channel before intersecting with the West Springs Ditch, Whittaker does not have a right to divert Stroud Creek water downstream of the Whittaker Diversion. The expert reports prepared by Whittaker’s expert witness, Bryce Contor, referred to the ditch running from west to east, which prevents Stroud

Creek from continuing to flow to the north, as the West Springs Ditch. Ex. 151 at 5, 7. Bryce Contor also observed that the West Springs Ditch captures any flow remaining in Stroud Creek. Ex. 153 at 4, 11 (“private ditch system now mingles the flow from the West Spring with flow from [Stroud Creek]”). The *Preliminary Order* adopted the ditch names used by Contor. The term “West Springs Ditch,” as used in the *Preliminary Order*, refers to the ditch extending from the West Springs complex on the west to the hilltop splitter on the east.

Source of Water for Bohan Ditch

None of the findings of fact in the *Preliminary Order* identify the source of water diverted through the Bohan Ditch when it was used for irrigation. The Analysis section of the order, however, states that the Bohan Ditch was once used to convey Stroud Creek water. *Preliminary Order* at 10. This statement was based on an expert report offered by Whittaker. According to Whittaker’s expert, Bryce Contor, “the Bohan Ditch would have captured any flow from upstream including any [Stroud Creek] flow that had not been captured by the [West Springs Ditch].” Ex. 153 at 4. The *Whittaker Petition* notes that the Bohan Ditch was once used to convey spring water arising on the west side of Stroud Creek. *Whittaker Petition* at 16-18; Exs. 154 and 155. Based on the 1954 Engineer’s Map, spring water was once flumed over the Stroud Creek channel for delivery to lands on the east side of the creek. Exs. 154 and 155. The error identified by Whittaker, if one exists, is minor. It does not change the hearing officer’s analysis or the outcome of the case.

Equitable Doctrine of Laches

Whittaker provides a thorough summary of the equitable doctrine of laches and establishes that the doctrine has been applied in water rights cases in the past. It is not clear, however, how the equitable doctrine of laches applies to this contested case. Whittaker argues that McConnell has delayed asserting that the current site where Stroud Creek water is released into Lee Creek is different from the historical location of the confluence of Stroud Creek and Right Fork of Lee Creek. *Whittaker Petition* at 27.

Prior to 2014, the McConnell water rights were diverted through the Kauer Ditch, located approximately one mile upstream of the Whittaker Diversion. Water diverted through the Kauer Ditch was injected into the Right Fork of Lee Creek upstream of the historical confluence of Stroud Creek and Right Fork of Lee Creek. When the Kauer Ditch was in use, McConnell had no reason to investigate the flow of Stroud Creek through the Whittaker property. The Snake River Basin Adjudication (“SRBA”) court issued partial decrees for the McConnell water rights (74-361 through 74-365, 74-367 and 74-368) on August 13, 2014. The partial decrees did not identify the Kauer Ditch as an authorized point of diversion. Consequently, McConnell stopped diverting water through the Kauer Ditch after the partial decrees were issued. Any arguments related to equitable remedies, requiring McConnell to continue to divert their water rights at the Kauer Ditch should have been raised in the SRBA. McConnell has only had reason to investigate the flow of Stroud Creek through the Whittaker Two Dot Ranch property and the confluence of Stroud Creek and Right Fork of Lee Creek since 2014. Six or seven years does not constitute “long and continuous knowing acquiescence” as required by the equitable doctrine of laches.

Whittaker also asserts the equitable doctrine of laches to prevent McConnell from making a water call against water right 74-157. *Whittaker Petition* at 27. As noted in the *Preliminary Order*, the approval of Application 84441 does not change the legal relationship between water right 74-157 and McConnell's water rights. The authorized point(s) of diversion for the McConnell water rights have been and will continue to be located downstream of water right 74-157. The determination of whether McConnell can make a delivery call against water right 74-157 is not essential to the outcome of this contested case. Whittaker can raise their arguments about how the equitable doctrine of laches applies to a delivery call against water right 74-157 if and when McConnell makes a delivery call under their senior water rights.

Johnson Petition

The *Johnson Petition* does not identify any erroneous facts in the *Preliminary Order*. It simply restates the injury concerns expressed in the original protest filed by Johnson. Johnson's injury concerns were already considered by the hearing officer. McConnell's Upper Diversion is located downstream of the confluence of Stroud Creek and Right Fork of Lee Creek. The points of diversion for Johnson's water rights 74-949 and 74-15201 are located downstream of the Upper Diversion. The points of diversion for Johnson's water rights 74-949 and 74-15201 are also located downstream of the McConnell's proposed Lower Diversion. Transfer 84441 does not change the spatial or legal relationship between the McConnell water rights and water rights 74-949 and 74-15201. The *Johnson Petition* does not raise any new facts or arguments and does not warrant an amendment of the *Preliminary Order*.

ORDER

IT IS HEREBY ORDERED that *Whittaker Petition* and *Johnson Petition* are DENIED.

Dated this 21st day of June 2021.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of June 2021, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Document Served: Order Denying Petitions for Reconsideration

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Christina Henman
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

The accompanying order is an **Order Denying Petition for Reconsideration** of the "preliminary order" issued previously in this proceeding by the department pursuant to section 67-5243, Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after the service date of this denial of petition for reconsideration of the preliminary order, any party may in writing file exceptions to any part of the preliminary order and file a brief in support of the party's position on any issue in the proceeding with the Director. Otherwise, the preliminary order will become a final order of the agency.

If any party files an exception and/or brief, opposing parties shall have fourteen (14) days to respond to the exception and/or brief. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The

department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.